Supreme Court, U.S.
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90-1782

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ALFLEX CORPORATION

Petitioner,

v.

UNDERWRITERS LABORATORIES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL J. FRACKMAN
Counsel of Record
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-2000

DANIEL M. PETROCELLI
THOMAS M. HINES
MITCHELL, SILBERBERG & KNUPP

Attorneys for Petitioner
Alflex Corporation

Statement Pursuant to Rule 29.1

Petitioner Alflex Corporation has the following parent company: ADF, Inc. ADF, Inc. is owned by two entities: AEA Investors and Prudential Bache.

Petitioner Alflex Corporation has no subsidiaries.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts of the United States are allowed to interpret 28 U.S.C. § 1920, which authorizes only the taxation of specifically enumerated costs by the federal courts, in order to tax categories of costs not explicitly enumerated by Congress.

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I. OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit allowing the taxation of the costs of deposition copies and private service of process fees is reported at Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990) (per curiam). It is reprinted at p. 1 of the Appendix ("A-1").

II. JURISDICTION

The Court of Appeals for the Ninth Circuit entered its opinion allowing deposition copies and private service of process fees to be taxed on September 13, 1990. On September 27, 1990, Alflex filed a timely "Petition for Rehearing and Suggestion for Rehearing En Banc." On December 20, 1990, the United States Court of Appeals for the Ninth Circuit

entered an order denying the "Petition for Rehearing and Suggestion for Rehearing En Banc." This order is reprinted in the Appendix at p. A-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal statute involved is 28 U.S.C. § 1920, reprinted in the Appendix at A-21.

IV. STATEMENT OF THE CASE

Alflex Corporation ("Alflex") is a manufacturer of electrical conduit. On May 26, 1987, Alflex brought suit against Underwriters Laboratories, Inc. ("UL") the Nation's largest certification company, seeking damages and injunctive relief for violation of the Lanham Act, breach of contract, negligence,

unfair competition, and other claims. The District Court entered summary judgment on April 10, 1989, dismissing Alfex's claims. On May 16, 1989, the Clerk of the Court reviewed UL's Bill of Costs and awarded less than half of the $90,349.28 requested. Alflex then served and filed a Motion to Retax Costs, which was denied in its entirety. UL also made a Motion to Retax Costs which was granted, in part, and a total of $49,090.15 was taxed against Alflex. Included in this amount were $15,655.06 for copies of deposition transcripts, and $1,324.70 for private service of process fees. Judgment was entered on August 4, 1989.

V. HOW THE FEDERAL QUESTION AROSE BELOW

The jurisdiction of the District Court was invoked under Section 43(a) of the Lanham Act (15 U.S.C. § 1121), and under 28 U.S.C. § 1332

because of diversity of citizenship, the plaintiff being a citizen of California and the defendant a citizen of Delaware.

The District Court taxed costs against petitioner pursuant to 28 U.S.C. § 1920.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Opinion Is In Conflict With The Decision Of The U.S. Supreme Court In Crawford Fitting Co. v. J.T. Gibbons, Inc., 42 U.S. 437 (1987).

As the U.S. Supreme Court has made absolutely clear, "without plain evidence of Congressional intent," federal courts are not empowered "to exceed the limitations explicitly set out in [28 U.S.C. §] 1920 . . . ." Crawford Fitting Co.

v. J.T. Gibbons, Inc., 42 U.S. 437, 445 (1987). This holding was specifically recognized by the Ninth Circuit in Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988), which held that "Crawford strictly limits reimbursable costs to those enumerated in Section 1920." (emphasis added).

As Crawford made clear, the sole discretion available to the judiciary is to decline the taxpayer's costs expressly authorized by Congress. No discretion exists to permit the taxing of unenumerated costs. Crawford, supra, 482 U.S. at 441-42; see also Maxwell, supra, 682 F.2d at 770.

In its Opinion, however, the Ninth Circuit diverges from Crawford and Maxwell, and returns to a view enunciated in Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), cert.

denied, 375 U.S. 922 (1963) which held that § 1920 grants "implicit" authority for the federal courts to interpret those costs which may properly be taxed – a view subsequently rejected by Crawford and Maxwell.

In its Opinion, the Ninth Circuit held that:

> "[O]ur interpretation in Independent Iron Works, that section 1920(2) encompasses the cost of a deposition copy, is still good law, because, even after Crawford, we may interpret the meaning of the items enumerated as taxable costs in Section 1920(2)."

See Oppinion at A-12.

Yet, by allowing the costs of deposition copies and private service of process fees to be taxed, the Ninth Circuit did more than simply interpret the meaning of enumerated items; instead it created two entirely new categories of costs never contemplated by Congress. This becomes abundantly clear by

examining the language of the statute, and comparing Crawford with the Opinion of the Ninth Circuit.

> As 28 U.S.C. § 1920 states, in relevant part:
>
> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> . . .
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case . . . ."

A comparison of the plain words of § 1920(4) and § 1920(2) makes it clear that Congress considered originals and copies to be separate and distinct items; § 1920(4) explicitly mentions copies, while § 1920(2)

mentions only the original transcript. It is also clear that when Congress intended copies to be taxed; it expressly used that very word.

In its Opinion, however, the Ninth Circuit relies on a recent decision from the Fifth Circuit which held that, although Crawford "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not prevent courts from interpreting the meaning of the phrases used in Section 1920." Westwind Africa Line v. Corpus Christy Marine Services Co., 834 F.2d 1232, 1238 (5th Cir. 1988). See also SK Hand Tool Corp. v. Dresser Industries, Inc., 852 F.2d 936, 944 (7th Cir. 1988), cert. denied, 106 L. Ed. 2d 589 (1989). Yet, although this Court (and many others) have interpreted the word "transcript" to include the transcript of a deposition, no interpretation of the noun can logically include both the original and a copy thereof. Likewise, to

interpret the phrase "fees . . . of the marshal" to encompass any fees, whether generated by the marshal or anyone else, is to create an entirely new category of costs never explicitly authorized by Congress.

As Crawford noted, Section 1920 "embodies Congress' considered choice as to the kinds of expenses that a federal court may tax its costs against a losing party . . . ." Crawford, supra, 482 U.S. at 440. In its Opinion, however, the Ninth Circuit ignores this considered choice and interprets "transcript" to mean "transcript plus copy" and "marshal" to mean "any authorized process server." Such an interpretation is directly at odds with Crawford's holding that the sole authority to create categories of taxable costs rests with Congress, not with the courts. See, e.g., Viacao Aerea Sao Paulo v. Int'l Leasing Finance Corp., 119 F.R.D. 435, 439 (C.D.

Cal. 1988) ("Crawford . . . precluded costs other than those expressly authorized by statute").

II.

The Ninth Circuit's Opinion Is In Conflict With Crawford's Requirement Of A Single National Standard In Taxing Costs

Absolute Congressional control over the taxation of costs insures fairness to all litigants by standardizing categories of taxable costs throughout the United States. See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 250-52 (1975). For this reason, Crawford held that the express, literal words of Congress are the single guideline to be followed by the federal courts in taxing costs. Because the Ninth Circuit's Opinion does not track the express, literal language of 28 U.S.C. § 1920, the single nation standard described in Alyeska and upheld by Crawford falls by the way side.

Furthermore, in applying 28 U.S.C. § 1920 as it has, and by returning a measure of interpretative leeway to the district courts, it is inevitable that national uniformity will become impossible. Indeed, this has already happened. Compare Opinion with Denny v. Westfield College, 880 F.2d 1465, 1472 (1st Cir. 1989) and Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985). If the power of tax costs is "implied" rather than "express" no single standard is possible. This is a question of exceptional importance overlooked in the Ninth Circuit's Opinion.

III.

The Ninth Circuit's Opinion Is In Conflict With Other Circuits Which Have Held That Crawford Strictly Limits Taxable Costs, And Does Not Allow Private Service Of Process Fees

Decisions in other circuits reveal a much stricter view of Crawford than that evidence by the Ninth Circuit Opinion. As the First Circuit noted in

considering expert witness fees, "Crawford warns us in unmistakable language not to try our hand at rewriting the statutory scheme according to our own notions of equity." Denny v. Westfield State College, supra, 880 F.2d at 1472. This view has also been expressed by the Eighth Circuit which has specifically held that private service of process fees do not fall under 28 U.S.C. § 1920(1) in light of Crawford. Crues v. KFC Corp., supra, 768 F.2d at 234. The Ninth Circuit's belief that "Congress exhibited an intent to make service of process a taxable item" (See Opinion at A-16), therefore, is directly at odds with the Eighth Circuit. Such a "belief" also diverges from Crawford's requirement that the courts should not interpret Congress' intentions, but instead should follow the express language of the statute.

CONCLUSION

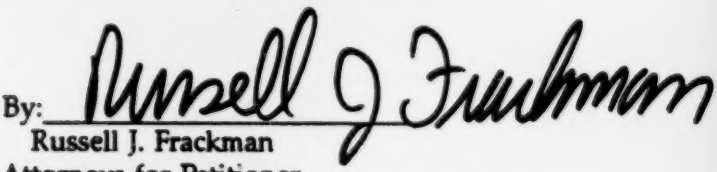
For the above-stated reasons, a Petition for Writ of Certiorari should be granted.

Dated: March 20, 1991

Respectfully submitted

RUSSELL J. FRACKMAN
Counsel of Record
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064

DANIEL J. PETROCELLI
THOMAS M. HINES
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064-1683

By: 
Russell J. Frackman
Attorneys for Petitioner
Alflex Corporation

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALFLEX CORPORATION, Plaintiff-Appellant, v. UNDERWRITERS LABORATORIES, INC., Defendant-Appellee.	)	No. 89-56008 D.C. No. CV 87-3344 JGD OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
June 6, 1990 – Pasadena, California

Filed September 13, 1990

Before: James R. Browning and Harry Pregerson, Circuit
Judges, and Thomas J. MacBride, District Judge[1]

Per Curiam

[1] The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

SUMMARY

Courts and Procedure

Affirming a district court grant of summary judgment, the court of appeals held that the taxing of costs for copies of depositions and private service of process fees was proper.

The district court granted summary judgment against appellant Alflex Corporation. On appeal, that judgment was affirmed in an unpublished opinion. Alflex now challenges the district court's award of costs to Underwriters Laboratories, Inc. for the expenses it incurred in obtaining a copy of the transcript of each deposition taken by Alfex, and in

hiring private process servers to serve deposition subpoenas.

[1] Fees for deposition copies and private service of process are properly taxed against the non-prevailing party. [2] Taxing costs for copies of depositions was proper since Alflex did not challenge the district court's finding that the deposition copies were necessarily obtained. [3] Private process servers' fees are also properly taxed as costs. [4] In making Marshal's fees taxable as costs, Congress exhibited an intent to make service of process a taxable item. Now that the Marshal is no longer involved as often in the serving of summonses and subpoenas, the cost of private process serves should be taxable under the statute in question.

COUNSEL

Thomas Hines, Mitchell, Silberberg & Knupp, Los Angeles, California, for the plaintiff-appellant.

John R. Myers, Bell, Boyd and Lloyd, Chicago, Illinois, for the defendant-appellee.

OPINION

PER CURIAM:

The district court granted summary judgment in favor of respondent Underwriters Laboratories (UL) in a suit brought by appellant Alflex Corporation (Alflex). We affirmed the summary judgment in an unpublished disposition.

In this appeal, Alflex challenges the district court's award of costs to UL for the expenses UL incurred in obtaining a copy of the transcript of each deposition taken by Alflex and in hiring private process servers to serve deposition subpoenas. Alflex contends that these items are not properly taxable as costs in light of the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

We review the district judge's award of costs for abuse of discretion. *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988). We affirm the district court and hold that the taxing of costs for copies of depositions and private service of process fees was proper.

In *Crawford*, 482 U.S. 437 (1987), the Supreme Court held that courts do not have discretion under Fed. R. Civ. P. 54(d)[1] to tax whatever costs seem appropriate; rather, courts may tax only costs defined in 28 U.S.C. § 1920.[2] "Section 1920 enumerates

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[1] Rule 54(d) states that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

[2] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(continued...)

expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." 482 U.S. at 441-42.

In this case, the district court taxed the cost of deposition copies and of private service of process pursuant to the Local Rules of the United States District Court for the Central District of California ("Local Rules"). Local Rule 16.4.6(a) permits taxing "[t]he cost of the original and one copy of all depositions used for any purpose in connection with the case." Local Rule 16.4.2 permits taxing as costs "[f]ees for service of process (whether served by the

---

[2](...continued)

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensations of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

United States Marshal or other persons authorized by Fed. R. Civ. P. 4).

Appellant Alflex argues that, in light of *Crawford*, these local rules should not be followed because they permit costs to be taxed that are not explicitly enumerated in section 1920.

For support, Alflex cites *Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp.*, 119 F.R.D. 435 (C.D. Cal. 1988). In *Viacao*, the district court held that although deposition costs fall within the scope of § 1920(2),[3]

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[3] Section 1920(2) allows for "Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *See supra* note 2.

Alflex does not argue that the cost of the *original* deposition transcript is not within the scope of this section. Indeed, there is much support for the proposition that section 1920(2) covers the costs of *deposition* transcripts, as well as trial transcripts. In

(continued...)

id. at 438, costs for *copies* of depositions do not. *Id.* at 439. The court determined that although this circuit, before *Crawford*, held that authorization to award costs of deposition copies was implied by section 1920(2), *see Independent Iron Works*, 322 F.2d at 678, such costs could no longer be taxed because "*Crawford* . . . precluded costs other than those expressly authorized by statute." *Viacao*, 119 F.R.D. at

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[3](...continued)
Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), this court held that the language of that section "evidences an intent . . . to include within the items of cost the expenses of copies of transcripts of pretrial as well as trial proceedings." 322 F.2d at 677 n.26. In *Hudson v. Nabisco Brands*, 758 F.2d 1237 (7th Cir. 1985), the Fifth Circuit held that section 1920(2) provides the statutory basis for awarding costs for obtaining an original deposition transcript. The court held that a deposition transcript is included in the term "stenographic transcript," and that the term "court reporter" in section 1920(2) applies to stenographers other than and in addition to the official court reporters assigned to a particular courtroom. *Id.* at 1242. *See also United States v. Kolesar*, 313 F.2d 835, 837-38 (5th Cir. 1963).

439. The district court in *Viacao* also excluded costs attributed to "subpoena serving fee[s]" "because § 1920 does not allow such costs to be taxed." *Id.*

[1] We disagree with the analysis in *Viacao* and hold that fees for deposition copies and private service of process are properly taxed under section 1920. In *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767 (9th Cir. 1988), which was decided after *Crawford*, we allowed the costs of photographic materials used at the trial to be taxed even though, as the appellant argued in that case, such materials are not specifically or explicitly contained in section 1920. In *Maxwell*, we held that costs of photographic materials used at the trial "are encompassed by" the statute's allowance under section 1920(4) for "[f]ees for exemplification and copies of papers necessarily obtained for use in the

case." *Maxwell*, 862 F.2d at 770. We stated: "We recognize that *Crawford* strictly limits reimbursable costs to those enumerated in § 1920. We hold only that the common meaning of the phrase 'exemplification and copies of papers' may under certain circumstances encompass illustrative materials *if 'necessarily* obtained for use in the case,' as § 1920 requires." *Id.* (emphasis in original).

[2] The cost of deposition copies is "encompassed" by section 1920(2), and is therefore properly taxed under the *Crawford* and *Maxwell* holdings. In *Independent Iron Works*, 322 F.2d at 678, we held that the power to tax the expense of copies of depositions is "'implicit in 28 U.S.C.A. § 1920(2),'" (quoting *Perlman v. Feldmann*, 116 F. Supp. 102, 109 (D. Conn. 1953)), "qualified only by the requirement of that statute that the various copies by 'necessarily

obtained for use in the case.'" *Id.* We held that obtaining copies of depositions taken by the opposing party may be considered necessary in certain instances. *Id.* at 678-679. We now hold that our interpretation in *Independent Iron Works*, that section 1920(2) encompasses the cost of a deposition copy, is still good law, because, even after *Crawford*, we may interpret the meaning of the items enumerated as taxable costs in section 1920(2). Thus, here, taxing costs for copies of depositions was proper since Alflex does not challenge the district court's finding that the deposition copies were necessarily obtained.

Our holding is supported by recent decisions from the Fifth and the Seventh Circuits that have held that courts are free to interpret what constitutes taxable costs after *Crawford*. In *West Wind Africa Line*

v. Corpus Christi Marine S., 834 F.2d 1232 (5th Cir. 1988), the Fifth Circuit held that although section 1920 does not specifically mention depositions, courts have interpreted sections 1920(2) and 1920(4) to authorize taxing the costs of deposition originals *and* deposition copies if necessarily obtained for the case. *Id.* at 1237-38. The court stated that *Crawford* "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not, however, prevent courts from interpreting the meaning of the phrases used in § 1920." *Id.* at 1238.

In *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 852 F.2d 936 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3241 (1989), the Seventh Circuit held that the Supreme Court's decision in *Crawford* did not overrule the circuit's interpretation of section 1920(2)

as including deposition transcripts. *Id.* at 943-44. The court stated:

> Even though section 1920 does not specifically mention depositions, we do not think that *Crawford Fitting* necessarily precludes courts from finding that deposition transcripts are authorized by that statute. We agree with the Fifth Circuit that the Supreme Court did not "prevent courts from interpreting the meaning of the phrases used in § 1920."

Id. at 944 (quoting *West Wind*, 834 F.2d at 1238). Although the court did not specifically discuss whether the cost of a *copy* of a deposition transcript falls within the statute, it implicitly held that it does

when it recognized the validity of a local rule that provided:

> Except as otherwise ordered by the court, only the cost of the original of such transcript or deposition *together with the cost of one copy each* where needed by counsel . . . shall be allowed.

Id. at 944 & n.10.

[3] We also hold that private process servers' fees are properly taxed as costs. Section 1920(1) allows "[f]ees of the clerk and marshal" to be taxed as costs. Marshal's fees are governed by 28 U.S.C. § 1921 which provides, *inter alia*, for the collection of fees for serving a subpoena or summons. Local

Rule 16.4.2 permits taxing as costs fees for service of process *by any person* authorized by Fed. R. Civ. P. 4.

[4] In making Marshal's fees taxable as costs in section 1920(1), we believe Congress exhibited an intent to make service of process a taxable item. Since the enactment of section 1920(1), the method of serving civil summonses and subpoenas has changed. The U.S. Marshal no longer has that responsibility in most cases, but rather a private party must be employed as process server. *See* Fed. R. Civ. P. 4(c)[4] and 45(c).[5] Now that the Marshal is

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[4] Rule 4(c)(2)(A) provides:

> A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

Rule 4(c)(2)(B) provides:

(continued...)

---

[4](...continued)

> A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose *only* –
>
> (i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,
>
> (ii) on behalf of the United States or an officer or agency of the United States, or
>
> (iii) pursuant to an order issued by the court stating that a United States marshal of deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

Fed. R. Civ. P. 4(c)(2)(B) (emphasis added)

[5] Rule 45(c) provides in pertinent part:

(continued...)

no longer involved as often in the serving of summonses and subpoenas, the cost of private process servers should be taxable under 28 U.S.C. § 1920(1).[6]

AFFIRMED.

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[5](...continued)

> A subpoena may be served by the marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age . . .

[6] We recognize that the Eighth Circuit held differently in *Crues v. KFC Corp.*, 768 F.2d 230 (8th Cir. 1985). There, the court held that the prevailing party could not recover costs for use of a special process server because "28 U.S.C. § 1920 (1982) contains no provision for such expenses." *Id.* at 234.

However, we find the reasoning in *Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637 (N.D. Ind. 1987) more persuasive. In *Roberts* the district court held that "[d]ue to the substitution of private process servers for the U.S. Marshal Service in recent years, it is appropriate to allow private process fees as costs." *Id.* at 641.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFLEX CORPORATION,	)	
	)	
Plaintiff-Appellant,	)	No. 89-56008
	)	
v.	)	ORDER
	)	
UNDERWRITERS LABORATORIES, INC.,	)	
	)	
Defendant-Appellee.	)	
	)	

Before: BROWNING, PREGERSON, Circuit Judges, and MACBRIDE, District Judge*

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

* The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

28 U.S.C. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensations of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Supreme Court, U.S.
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(2)

No. 90-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFLEX CORPORATION,

Petitioner,

v.

UNDERWRITERS LABORATORIES INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VICTOR E. GRIMM
(Counsel of Record)
JOHN R. MYERS
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Chicago, Illinois 60602
(312) 372-1121

DEBRA S. RADE
Underwriters Laboratories Inc.
333 Pfingsten Road
Northbrook, Illinois 60062

Attorneys for Respondent

Dated: September 6, 1991

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Petitioner has misstated the question presented. Properly stated, the question is:

Whether the taxation of costs for deposition transcript copies and deposition subpoena service fees is authorized by 28 U.S.C. § 1920?

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No. 90-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFLEX CORPORATION,

Petitioner,

v.

UNDERWRITERS LABORATORIES INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Underwriters Laboratories Inc. ("UL")[1] respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the decision of the Ninth Circuit Court of Appeals ("Opinion").[2]

---

[1] Respondent Underwriters Laboratories Inc. has no parent companies, subsidiaries or affiliates.

[2] The opinion is reprinted in the Appendix to the Petition for Certiorari ("A-____"). The order of the district court, Order Re Plaintiff's and Defendant's Motions to Retax Costs, is reprinted in the Appendix to this brief ("RA-____").

ADDITIONAL RELEVANT LEGAL AUTHORITY

Rules 4(c) and 45(c) of the Federal Rules of Civil Procedure and applicable sections of Rule 16.4 of the Local Rules of the United States District Court of the Central District of California are reprinted in the Appendix to this Brief at RA-3-5.

STATEMENT OF THE CASE

Petitioner, Alflex Corporation ("Alflex"), filed an action against UL in the Central District of California for alleged violations of the Lanham Act and related state law claims. The district court granted summary judgment in favor of UL, and the United States Court of Appeals for the Ninth Circuit affirmed. Alflex filed a petition for writ of certiorari on the merits, which is Petition No. 90-1781.

The district court also awarded UL $49,090.15 in costs, and Alflex filed an appeal, challenging $16,979.76 of the costs award, $15,655.06 for copies of deposition transcripts and $1,324.70 for deposition subpoena service fees. The Ninth Circuit affirmed, and Alflex filed a petition for writ of certiorari on these cost items to which UL responds herein.

REASONS FOR DENYING THE WRIT

Alflex fails to present an issue which merits review because: (i) the Ninth Circuit opinion below is not in conflict with *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); (ii) the Ninth Circuit's reading of 28 U.S.C. § 1920 does not threaten a single national standard for taxation of costs; and (iii) the lone decision cited by Alflex as contrary to the Ninth Circuit's approval of the award of deposition subpoena service fees of $1,324.70 does not create a "conflict with other circuits" that justifies this Court's review.

I.

The Ninth Circuit Opinion Is Not In Conflict With This Court's Decision In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)

Alflex has mischaracterized this Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) in an effort to portray a conflict where none exists. In *Crawford*, the Court rejected petitioners' argument that Rule 54(d), Fed. R. Civ. P., "is a separate source of power to tax as costs expenses not enumerated in § 1920." *Id.* at 441. The Ninth Circuit, here, did not base its decision on Rule 54(d) as a "separate source of power" in affirming the cost award. Instead, consistent with *Crawford*, the court relied on the provisions of §1920(1) and (2). A-11-12, A-15-18.

Contrary to Alflex's suggestion, *Crawford* does not hold that § 1920 is to be given the narrowest possible reading. Petition, pp. 5-6. In *Crawford*, the Court was addressing an unambiguous thirty dollar per day restriction on wit-

ness fees, which petitioners sought to avoid under the authority of Rule 54(d). *Id.* at 442; 28 U.S.C. §§ 1821, 1920. While ruling that courts may not rely on Rule 54(d) as authority to go beyond § 1920, the Court did not reject the body of law that has developed in the lower courts interpreting the language of § 1920 itself. Necessarily, the lower courts have given a practical meaning to "Congress' considered choice as to the kinds of expenses that a federal court may tax as costs." *Id.* at 440.

Alflex admits that the "plain words" of § 1920(2), "Fees of the court reporter for . . . the stenographic transcript," have been properly interpreted by this Court and by other courts to include a deposition transcript even though these "plain words" do not specifically mention depositions. Petition, p. 8; A-8-9 n.3; 6 *Moore's Federal Practice* ¶ 54.77[4], at 54-417-418 (2d ed. 1990). Thus, the courts have given § 1920 a natural reading in light of the realities of modern litigation to include deposition as well as hearing transcripts. *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1242-43 (7th Cir. 1985).

Nevertheless, Alflex fixates on the singular form of the noun, "transcript," to argue that the statute cannot reasonably be read to allow recovery of the costs of a *copy* of a deposition transcript, that Congress could only have intended "transcript" to mean the "*original.*" Petition, p. 8. These were depositions taken by petitioner, of which UL received only one copy. Alflex's position that "deposition" may be read into § 1920(2), but "deposition copy" may not, is inherently illogical and unreasonable. No support for such a half practical/half literal interpretation of § 1920 is found in *Crawford.*

For almost thirty years, courts have read § 1920(2) to include deposition copies as a recoverable cost. *United States v. Kolesar*, 313 F.2d 835, 838-39 (5th Cir. 1963);

Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 678 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *SCA Services, Inc. v. Lucky Stores*, 599 F.2d 178, 181 (7th Cir. 1979).[3] This interpretation has been codified in the local rules of numerous federal district courts, including the district court below. *See, e.g.*, Local Rules of the United States District Court of: the Central District of California, Rule 16.4.6(a); the Northern District of Illinois, Rule 45(b); the District of Columbia, Rule 214(d)(6); the Eastern District of Wisconsin, Rule 9.02(b); the Eastern District of New York, Rule 11(c)(2); and Standing Order (M-10-468) of the Board of Judges of the Southern District of New York, Item (2), dated April 20, 1990.

The court below properly concluded that *Crawford* did not overrule these cases, invalidate these local rules and prohibit the award of costs for deposition copies under § 1920. A-10-12. Other circuit courts, awarding such costs after *Crawford*, have arrived at the same conclusion. *Northbrook Excess and Surplus Insurance Co. v. Procter & Gamble Co.*, 924 F.2d 633, 642-643, 644 n.15 (7th Cir. 1991); *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 852 F.2d 936, 944 (7th Cir. 1988), *cert. denied*, 492 U.S. 918 (1989); *West Wind Africa Line, Ltd. v. Corpus Christi Marine Services, Co.*, 834 F.2d 1232, 1237-38 (5th Cir. 1988). The only case cited by Alflex in support of its interpretation of *Crawford*, *Viacao Aerea Sao Paulo, S.A. v. International Lease Finance Corp.*, 119 F.R.D. 435

[3] *See, e.g., Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1553 (5th Cir. 1984) (recovery of costs of copies of depositions called by successful party); *Govas v. Chalmers*, 1991 U.S. Dist. LEXIS 7653 at 2-4 (N.D. Ill. June 5, 1991); *Morrissey v. County Tower Corp.*, 568 F. Supp. 980, 983 (E.D. Mo. 1983); *Murphy v. Amoco Production Co.*, 558 F. Supp. 591, 594 (D. N.D. 1983), *aff'd*, 729 F.2d 552 (8th Cir. 1984); *Principe v. McDonald's Corp.*, 95 F.R.D. 34, 37 (E.D. Va. 1982); *Lockett v. Hellenic Sea Transports, Ltd.*, 60 F.R.D. 469, 472 (E.D. Pa. 1973).

(C.D. Cal. 1988), was specifically overturned by the Ninth Circuit in the opinion below. A-10; Petition, pp. 9-10.

Similarly, the award of deposition subpoena service fees here falls within 28 U.S.C. § 1920(1), allowing for the taxation of the fees of the marshal. The Ninth Circuit noted that 28 U.S.C. § 1921 provides for the collection of fees for serving subpoenas by the marshal and that Fed. R. Civ. P. 4(c) and 45(c) have been amended to prohibit service of subpoenas by the marshal in the circumstances present in this case, but, alternatively, to allow service by others. A-15-16. The court reasoned that "Congress exhibited an intent to make service of process a taxable item" and that, since "the Marshal is no longer involved as often in the serving of summonses and subpoenas, the cost of process servers should be taxable under 28 U.S.C. 1920(1)." A-16-18 (footnote omitted).

Most courts that have addressed the issue have reached the same conclusion. *See Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637, 641 (N.D. Ind. 1987). *See also In re Howard*, 1991 Bankr. LEXIS 695 at 6 (D. Md. April 30, 1991) (majority of courts allow fees of private process servers as costs under § 1920(1)); *Tang How v. Edward J. Gerrits, Inc.*, 756 F. Supp. 1540, 1545 (S.D. Fla. 1991); *Harrington v. City of Portland*, 1990 U.S. Dist. LEXIS 15102 at 10 (D. Ore. November 7, 1990); *Cross v. General Motors Corp.*, 563 F. Supp. 368, 370 (E.D. Mo. 1982), *aff'd*, 721 F.2d 1152 (8th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984). This interpretation has also been codified by federal district courts in their local rules. *See, e.g.*, the Local Rules of the United States District Court of: the Central District of California, Rule 16.4.2; the Eastern District of California, Rule 292(f)(2); and Standing Order (M-10-468) of the Board of Judges of the Southern District of New York, Item (10), dated April 20, 1990.

Other than *Viacao*, overruled by the court below, Alflex cites only one case purportedly holding a contrary view on this issue: *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985). Petition, p. 12. *Crues*, decided before *Crawford*, offers no compelling rationale for denying such costs. Indeed, the court in *Crues* does not indicate whether it even considered the effect of the 1983 amendments to Fed. R. Civ. P. which eliminated marshal service of subpoenas in most cases. *Id.* at 234. Further, KFC submitted a bill for costs relating to a 1982 trial and a 1984 retrial in the case, but it is not apparent from the opinion whether the marshal was still available for service of process at the time the costs at issue were incurred. *Id.* at 232, 234-35. Given these two critical distinctions, it is by no means apparent that the Eighth Circuit would rule any differently than the court below.

Alflex would have this Court completely eliminate recovery of subpoena service fees in most cases despite Congress' clear intent to the contrary. Alflex's interpretation would render § 1920 meaningless much as the petitioner's proposed interpretation would have done in *Crawford*, except that, here, Alflex is attempting to *delete* rather than add categories of taxable costs. *Crawford*, *supra* at 441-42. Petition, p. 9. By contrast, the court below, with due consideration for the concerns expressed in *Crawford*, allowed recovery specifically for the "kinds of expenses" enumerated by Congress under § 1920. *Id.* at 440. A-6-7, A-10-14.

II.

The Ninth Circuit's Decision Is Consistent With A Single National Standard For Taxation of Costs

Alflex argues that the Ninth Circuit's taxation of the costs is based upon an "implied" rather than an "express"

meaning of 28 U.S.C. § 1920 and will therefore prevent "national uniformity" in the taxation of costs by federal courts. Petition, pp. 10-11. Yet, it is Alflex that attempts to disturb the national standard that has been developed by the courts interpreting §1920. As discussed above, the courts that have addressed these issues, in case law or local rules, have generally recognized that deposition copies and private process service fees are recoverable costs under the authority of § 1920. The result has been a consistent interpretation of the provisions at issue, awarding costs that Congress has clearly shown an intention to allow.

On the other hand, *Viacao Aerea*, upon which Alflex relies most heavily, was a maverick decision of a district court judge, in contravention of the local court rules. *Viacao Aerea, supra* at 438-39. The decision was never followed or cited, even within the Central District of California, was ignored completely by the district court below and was overruled by the Ninth Circuit. A-10. No other court has adopted a similar view of § 1920 under the auspices of this Court's *Crawford* decision or under any other authority. Thus, *Viacao*, not the Ninth Circuit's opinion, is the aberration. The Ninth Circuit has not overlooked "a question of national importance," as Alflex suggests. Petition, p. 11.

III.

The Lone Decision Relied On By Petitioner On The Award Of Deposition Service Fees Does Not Create A "Conflict With Other Circuits" That Justifies Review

Alflex implies that the opinion below affirming an award of $1,324.70 for private process server fees "is in conflict with other circuits" which have adopted a "stricter view

of *Crawford*." Petition, pp. 11-12. However, Alflex cites only one circuit court decision that actually denies this item of costs: *Crues v. KFC Corp.*, *supra*. Petition, p. 12. In *Crues*, the Eighth Circuit instructed the district court not to award "special process server" fees. *Id.* at 234. As discussed above, there is no evidence that the Eighth Circuit considered the 1983 amendments to Fed. R. Civ. P. 4(c) and 45(c) which effectively eliminated process service by marshals. Nor is it clear whether the costs at issue in *Crues* were incurred after these amendments became effective, or, indeed, that the Eighth Circuit would decide the case in the same manner today. *See* p. 7, *supra*.

Even if *Crues* were considered to be in conflict with the decision below, such a conflict, between two circuits, would be insufficient to merit review. Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983); Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982). *See also McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

VICTOR E. GRIMM
(Counsel of Record)
JOHN R. MYERS
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Chicago, Illinois 60602
(312) 372-1121

DEBRA S. RADE
Underwriters Laboratories Inc.
333 Pfingsten Road
Northbrook, Illinois 60062

Attorneys for Respondent

Dated: September 6, 1991

RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFLEX CORPORATION, a California corporation,	) Case No. CV 87-3344 (JGD)
Plaintiff,	) ORDER RE
v.	) PLAINTIFF'S AND DEFENDANT'S
UNDERWRITERS LABORATORIES INC., a Delaware corporation,	) MOTIONS TO RETAX COSTS
Defendant.	)

The motions of defendant Underwriters Laboratories, Inc. and plaintiff Alflex Corporation to retax costs came on regularly for hearing on July 24, 1989, in the United States District Court before the Honorable John G. Davies. After full consideration of the moving and responding papers, all supporting papers and exhibits, the file in this case, and the oral argument of counsel, the Court rendered its decision.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Retax Costs is denied in its entirety;
2. Defendant's Motion to Retax Costs is granted in the following respects:
   (a) Service of process fees in the sum of $1,324.70 are awarded.
   (b) Photocopying costs in the sum of $3,107.80, minus $288.60 already awarded.

(c) The claim for additional deposition costs in the sum of $1,424.01 is also awarded.

3. Defendant's request for expedited delivery costs for transcription of depositions to computer disks is not allowed.

Therefore, in conjunction with the previous findings of the Clerk, defendant Underwriters Laboratories, Inc. is entitled to recover the following costs from plaintiff Alflex Corporation:

1. Deposition costs in the amount of $44,253.25 ($42,829.24 awarded by the Clerk plus an additional $1,424.01);
2. $693.00 in non-party witness fees and filing fees;
3. Service of process fees of $1,324.70;
4. Photocopying costs of $2,819.20 ($3,107.80 minus $288.60 already awarded).
5. Total awarded: $49,090.15.

DATED: August 4, 1989

John G. Davies
United States District Judge

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(c)

(1) Process, other than a subpoena or a summons and complaint, shall be served by a US marshal or deputy US marshal, or by a person specially appointed for the purpose.

(2) (A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a US marshal or deputy US marshal, or by a person specially appointed by the court for that purpose, only—

(i) on behalf of a party authorized to proceed *in forma pauperis* pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28 U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a US marshal or deputy US marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the

person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope postage prepaid, addressed to the sender. If no acknowledgment of service of this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) the notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) the court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

Rule 45(c) Service

A subpoena may be served by the marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the U.S. or an officer or agency thereof, fees and mileage need not be tendered.

LOCAL RULES FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

16.4 *Items taxable as costs.* The following items are taxable as costs:

16.4.2 *Fees for service of process.* Fees for service of process (whether served by the United States Marshal or other persons authorized by FR Civ P4).

16.4.6 *Depositions.* Costs incurred in connection with taking depositions, including

(a) The cost of the original and one copy of all depositions used for any purpose in connection with the case.

Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

(3)

No. 90-1782

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ALFLEX CORPORATION,

Petitioner,

v.

UNDERWRITERS LABORATORIES, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL J. FRACKMAN
Counsel of Record
DANIEL M. PETROCELLI
THOMAS M. HINES
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-2000

Attorneys for Petitioner
Alflex Corporation

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I.

INTRODUCTION

Petitioner, Alflex Corporation ("Alflex" or "Petitioner"), is a manufacturer of flexible electrical conduit. On May 26, 1987, Petitioner brought suit against Respondent, Underwriters Laboratories, Inc. ("UL" or "Respondent"), the nation's premier certification company. Petitioner sought damages and injunctive relief for violations of the Lanham Act, unfair competition, and other claims, arising out of UL's listing of a third-party's competitive product when that product failed to and was not required by UL to meet the same standards required of Petitioner and other manufacturers of flexible electrical conduits.

The District Court entered summary judgment on April 10, 1989, dismissing Alflex's claims. On May 16, 1989, the Clerk of the Court reviewed UL's Bill of Costs and awarded less than half of the $90,349.28 requested. Alflex then served and filed a Motion to Retax Costs, which was denied in its entire-

ty. UL also made a Motion to Retax Costs, which was granted, in part, and a total of $49,090.15 was taxed against Alflex. Included in this amount were $15,655.06 for copies of deposition transcripts and $1,324.70 for private service of process fees. Judgment was entered on August 4, 1989. Alflex appealed this award insofar as it included categories of costs not explicitly authorized by Congress and, therefore, not properly taxable under Crawford Fitting Co. v. J.T. Gibbins, Inc., 482 U.S. 437 (1987). The Ninth Circuit affirmed the District Court's award of costs in Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990) (per curiam).

II.

RESPONDENT IGNORES THE CONFLICT BETWEEN THE NINTH CIRCUIT OPINION AND THIS COURT'S MANDATE IN CRAWFORD

In Crawford Fitting Co. v. J.T. Gibbins, Inc., 482 U.S. 437 (1987) (hereinafter Crawford), this Court re-

viewed the statutory authority of the federal courts to tax costs and concluded that, "without plain evidence of Congressional intent," federal courts simply are not empowered "to exceed the limitations explicitly set out in [28 U.S.C. §] 1920." Id. at 445. As this Court went on to explain, the sole discretion available to the judiciary under the Federal Rules of Civil Procedure is the option of declining to tax costs; and no discretion exists to tax costs not expressly authorized by Congress. Id. at 441-42. In short, this Court held that § 1920 "embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against a losing party. . . . " Id. at 440. No other costs may properly be taxed.[1]

Rather than accept this clear mandate, however, the Ninth Circuit upheld the taxation of two categories

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[1] This clear directive was recently reaffirmed in West Virginia Hospitals v. Casey, ___ U.S. ___, 113 L. Ed 2d 67, 75-76 (1991) (§ 1920 is "an express limitation on the types of costs, which, absent other authority, may be shifted by the federal courts").

of costs never enumerated by statute, relying -- not upon any express statutory authority -- but upon an "implicit" authority to award costs.[2] As the Opinion states:

> "[E]ven after Crawford, we may interpret the meaning of the items enumerated as taxable costs in section 1920(2)."

Opinion at A-11, A-12.

Clearly the Ninth Circuit Opinion is in apparent conflict with the ruling in Crawford, which rejected such "implicit" authority; as such, strong grounds exist for granting a writ of certiorari.[3]

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[2] In so doing, the Ninth Circuit also overruled Aerea Sao Paulo, S.A. v. International Lease Finance Corp., 119 F.R.D. 435 (C.D. Cal 1988), which expressly held that the costs of deposition copies and private service of process fees could no properly be taxed pursuant to § 1920 because "Crawford . . . precluded costs other than those expressly authorized by statute. Id. at 439.

[3] In addition, the Ninth Circuit failed to examine Local Rules 16.4.6(a) and 16.4.2 of the Central District of California in light of Crawford and 28 U.S.C. § 1920. These rules violate 28 U.S.C. § 2071(a), which dictates that Local Rules must "be consistent with Acts of Congress."

See, e.g., United States v. Doe, 465 U.S. 605, 610 (1984); Lugar v. Edmonson Oil Co., 457 U.S. 922, 926 (1982).

Respondent argues that Crawford "did not reject the body of law that has developed in the lower courts interpreting the language of § 1920 itself" or that "the courts have given § 1920 a natural reading" in light of "the realities of modern litigation" (Opposition at 4, emphasis added). Such malleable standards, however, are utterly antithetical to the clear directives of Crawford.[4] In the name of "interpretation," Respon-

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[4] Improbably, Respondent buttresses this argument with a host of cases decided prior to Crawford, all of which rely upon the now-rejected view that § 1920 grants "implicit" authority to interpret which categories of costs may be taxed. See, e.g., Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), cert. denied, 375 U.S. 922 (1963); United States v. Kolesar, 313 F.2d 835 (5th Cir. 1963); Hudson v. Nabisco Brands, Inc., 758 F.2d 1237 (7th Cir. 1985); SCA Services, Inc. v. Lucky Stores, 599 F.2d 178 (7th Cir. 1979); Nissho-Iwai Co., v. Occidental Crude Sales, Inc., 729 F.2d 1530 (5th Cir. 1984); Morrissey v. County Tower Corp., 568 F. Supp. 980 (E.D. Mo. 1983); Murphy v. Amoco Production Co., 558 F. Supp. 591 (D.N.D. 1983), aff'd, 729 F.2d 552 (8th Cir. 1984); Principe v. McDonald's Corp., 95 F.R.D. 34 (E.D. Va. 1982); Lockett v. Hellenic Sea Transports, Ltd., 60 F.R.D. 469 (E.D. Pa. 1973).

(continued...)

dent would simply evade all limitations on the power to tax costs.[5] Yet, as this Court held in Crawford:

> "Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821[6] without plain evidence of congressional intent to supersede those sections ignores our long-standing practice of construing statutes in pari materia."

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[4](...continued)
With the exception of Harrington v. City of Portland, 1990 U.S. Dist. LEXIS 15102 (D. Ore. 1991) (which itself relies upon Independent Iron Works and its extra-statutory authority), Respondent's post-Crawford authority do not even mention Crawford. See, e.g., Govas v. Chalmers, 1991 U.S. Dist. LEXIS 7653 (N.D. Ill. 1991); In re Howard, 1991 Bankr. LEXIS 695 (D. Md. 1991).

[5] The weakness of Respondent's argument is made clear by taking it to its logical extreme. Under Respondent's reasoning, no limits are placed upon a court's power to "interpret" the statute; logically, a "natural" reading of § 1920 could include the costs of two, three, or even ten copies of deposition transcripts, given the "realities of modern litigation." Respondent does not identify precisely where such "interpretation" should end.

[6] 28 U.S.C. § 1821 governs witness fees. No such costs are at issue in this case.

Crawford, supra, 482 U.S. at 445 (citations omitted, emphasis added).

Unable to show any plain evidence that Congress has authorized the taxation of the cost of deposition copies or private service of process fees in the express, literal words of the statute, Respondent falls back upon tradition.[7] "For over thirty years," Respon-

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[7] Respondent argues that because the phrase "stenographic transcript" as used in § 1920 includes deposition transcripts, the phrase must also include copies of such a transcript. This is utterly illogical. Congress specifically authorized taxing the "fees of the court reporter for all or part of the stenographic transcript," whether that transcript be taken in the courtroom or at a deposition. Because no ambiguity exists in the statute, no "interpretation" is required.

Yet only the most bizarre reading of the noun "transcript" can lead to the conclusion that the word means both the thing itself and other things as well. (Following this argument, one eventually concludes that there is no need for the word "copy" in the language.) It is clear from the very face of the statute that when Congress intended to authorize the costs of copies, it did so in just so many words. See, e.g., § 1920(4) (authorizing taxing fees for "copies of papers"). Not surprisingly, when it did not intend to authorize such fees, it did not mention them.

Similarly, the phrase "fees . . . of the marshal" means exactly that. Had Congress wished to include "any authorized process server," it would have used those very words. Respondent argues that, because the Federal Rules of Civil Procedure changed in 1983 (eliminating service by the marshals in many instances), this implies that intent of Congress

(continued...)

dent argues, courts have "read" the statute to include deposition copies. (Opposition at 4.) This view has been codified in the local rules of "numerous" federal district courts.[8] (Opposition at 5.) Tradition, however, is not the standard; the standard is the express, literal words of Congress.

Because the Opinion is clearly at in conflict with this Court's decision in Crawford, certiorari is appropriate.

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[7](...continued)
must have changed as well. Yet this is the exact reverse of the statutory scheme. As Crawford explains, the authority to tax costs originates with Congress, not with the judiciary; as a result, § 1920 controls over the Federal Rules, not vice versa. Of course, should Congress wish to take the amendments to the Federal Rules into account, it may do so; as of the present time, however, it has not chosen to do so.

[8] A substantial number of Local Rules do not allow for copies of depositions and are silent on the issue of private service of process fees. See Section III, infra.

III.

THE OPINION BELOW CREATES CONFLICTS AMONG THE CIRCUITS AND DEFEATS THE PURPOSE OF 28 U.S.C. § 1920

By ignoring Crawford and overruling Viacao Area Sao Paulo, S.A. v. International Lease Finance Corp., 119 F.R.D 435 (C.D. Cal. 1988), the Opinion below has returned a large measure of interpretive leeway to the district courts in the Ninth Circuit. This creates a clear conflict among the Circuits over both the proper scope of § 1920, as well as the proper role of the judiciary in the fee taxing realm. Compare Opinion (allowing private service of process fees) with Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985) (disallowing same). Compare also Opinion (courts may interpret § 1920) and Denny v. Westfield College, 880 F.2d 1465, 1472 (1st Cir. 1989) ("Crawford warns us in unmistakable language not to try our hand at re-writing the statutory scheme according to our own notions of equity"); West Virginia University Hospi-

tals, Inc. v. Casey, 885 F.2d 11, 34 (3rd Cir. 1989), aff'd, ___ U.S. ___, 113 L. Ed. 2d 68, 76-76 (1991) ("We are constrained by the language of Crawford. . . we must defer to legislative fiat"); accord Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987), cert. denied, 486 U.S. 1008 (1988). Because of these conflicts between the First, Third, Fifth, Eighth, and Ninth Circuits, review is appropriate.

But review is necessary for another reason as well. A single Congressional standard over the taxation of costs is crucial because it insures fairness to all litigants by standardizing categories of taxable costs throughout the nation. See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 250-52 (1975). Instead of uniformity, however, there is inconsistency. The Opinion below not only stands as a prime example of this, it also adds to the disarray.

Taxing costs is part and parcel of virtually every case in the federal system; as such, the statute touches

every litigant in the nation. Yet, although the statutory scheme is designed to treat each litigant fairly and equally, it is clear that parties are taxed different amounts for entirely different categories of costs depending upon the precedent and rules of the particular District in which they litigate. Because the Opinion misinterprets the construction of an important federal statute -- one affecting virtually all parties in all parts of the nation -- review by this Court is critical. See, e.g., Patterson v. Lamb, 329 U.S. 539 (1947); United Steelworkers of America v. Usery, 429 U.S. 305, 307 n.3 (1977).

Respondent agrees that a single national standard is crucial, but, in a display of reverse logic, argues that following Crawford will "prevent" national uniformity because so many courts have declined to follow Crawford thus far. (Opposition at 7-8.) Because courts have "generally recognized" that private service of process fees and deposition copies are

recoverable costs, Respondent argues, a "consistent interpretation" already exists. (Opposition at 8.) The result, claims Respondent, is that courts award costs "that Congress has clearly shown an intention to allow." (Opposition at 8.)

If this were true, of course, there would be no conflicting decisions. Yet, as Petitioner has clearly demonstrated, the purported uniformity evident to Respondent is illusory. Conflicts already exist among various courts. Compare, e.g., Opinion and Crues v. KFC Corp., supra, 768 F.2d at 234 (refusing to tax private service of process fees). Moreover, these reported cases do not begin to tell the entire story. One need only examine the Local Rules around the nation (all of which are supposed to be consistent) to see that the taxation of deposition copying costs is in utter disarray. Compare, e.g., the six Local Rules cited by Respondent (allowing the cost of deposition copies to be taxed) with the Local Rules of the following

United States District Courts (which do not allow these costs to be taxed): Alaska, Rule 21(B)(3) (original only); Arizona, Rule 49(e)(3) (original only); the Southern District of California, Rule 265 (original only); Delaware, Rule 6.1B(3) (original only); Idaho, Rule 54.1(b)(3) (original only); Montana, Rule 265 (original only); Nevada, Rule 205(4) (original only); the Middle District of North Carolina, Rule 209(c)(1)(ii) (original only); the Northern Mariana Islands, Rule 125(3)(b) (original only); South Carolina, Rule 28.08 (original only); the Eastern District of Washington, Rule 54(f)(2) (original only).[9]

The existence of so many contradictory rules and decisions results in unfairness to litigants and makes national uniformity impossible. This state of affairs will simply continue if courts are allowed to

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[9] The situation is just as uncertain with regard to the taxation of private service of process fees. For example, while the Central and Northern Districts of California specifically allow such costs, the Southern District merely speaks to fees of the U.S. Marshal.

ignore Crawford as the Ninth Circuit has done, and "interpret" the intent of Congress rather than follow its express, literal meaning.[10]

In short, both because the Opinion below is in conflict with decisions of other Circuits, and because the application of an important federal statutory issue is involved, certiorari is appropriate.

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[10] Respondent's suggestion that these conflicts will work themselves out in the lower courts is nothing more than wishful thinking. (Opposition at 9.) Clearly, allowing each district court to decide for itself what Congress means without reference to a single standard has not, and will not, bring about the desired uniformity.

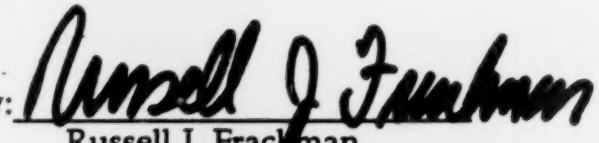
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: September 24, 1991

Respectfully submitted,

RUSSELL J. FRACKMAN
Counsel of Record
DANIEL M. PETROCELLI
THOMAS M. HINES
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California
Attorneys for Petitioner
Alflex Corporation

By: 

Russell J. Frackman
Attorneys for Petitioner
Alflex Corporation

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFLEX CORPORATION,	
	No. 89-56008
Plaintiff-Appellant,	
	D.C. No.
v.	CV 87-3344 JGD
UNDERWRITERS LABORATORIES, INC.,	OPINION
Defendant-Appellee.	

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
June 6, 1990 – Pasadena, California

Filed September 13, 1990

Before: James R. Browning and Harry Pregerson, Circuit
Judges, and Thomas J. MacBride, District Judge[1]

Per Curiam

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[1] The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

SUMMARY

Courts and Procedure

Affirming a district court grant of summary judgment, the court of appeals held that the taxing of costs for copies of depositions and private service of process fees was proper.

The district court granted summary judgment against appellant Alflex Corporation. On appeal, that judgment was affirmed in an unpublished opinion. Alflex now challenges the district court's award of costs to Underwriters Laboratories, Inc. for the expenses it incurred in obtaining a copy of the transcript of each deposition taken by Alfex, and in

hiring private process servers to serve deposition subpoenas.

[1] Fees for deposition copies and private service of process are properly taxed against the non-prevailing party. [2] Taxing costs for copies of depositions was proper since Alflex did not challenge the district court's finding that the deposition copies were necessarily obtained. [3] Private process servers' fees are also properly taxed as costs. [4] In making Marshal's fees taxable as costs, Congress exhibited an intent to make service of process a taxable item. Now that the Marshal is no longer involved as often in the serving of summonses and subpoenas, the cost of private process serves should be taxable under the statute in question.

COUNSEL

Thomas Hines, Mitchell, Silberberg & Knupp, Los Angeles, California, for the plaintiff-appellant.

John R. Myers, Bell, Boyd and Lloyd, Chicago, Illinois, for the defendant-appellee.

OPINION

PER CURIAM:

The district court granted summary judgment in favor of respondent Underwriters Laboratories (UL) in a suit brought by appellant Alflex Corporation (Alflex). We affirmed the summary judgment in an unpublished disposition.

In this appeal, Alflex challenges the district court's award of costs to UL for the expenses UL incurred in obtaining a copy of the transcript of each deposition taken by Alflex and in hiring private process servers to serve deposition subpoenas. Alflex contends that these items are not properly taxable as costs in light of the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

We review the district judge's award of costs for abuse of discretion. *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988). We affirm the district court and hold that the taxing of costs for copies of depositions and private service of process fees was proper.

In *Crawford*, 482 U.S. 437 (1987), the Supreme Court held that courts do not have discretion under Fed. R. Civ. P. 54(d)[1] to tax whatever costs seem appropriate; rather, courts may tax only costs defined in 28 U.S.C. § 1920.[2] "Section 1920 enumerates

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[1] Rule 54(d) states that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

[2] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(continued...)

expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." 482 U.S. at 441-42.

In this case, the district court taxed the cost of deposition copies and of private service of process pursuant to the Local Rules of the United States District Court for the Central District of California ("Local Rules"). Local Rule 16.4.6(a) permits taxing "[t]he cost of the original and one copy of all depositions used for any purpose in connection with the case." Local Rule 16.4.2 permits taxing as costs "[f]ees for service of process (whether served by the

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[2](...continued)

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensations of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

United States Marshal or other persons authorized by Fed. R. Civ. P. 4).

Appellant Alflex argues that, in light of *Crawford*, these local rules should not be followed because they permit costs to be taxed that are not explicitly enumerated in section 1920.

For support, Alflex cites *Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp.*, 119 F.R.D. 435 (C.D. Cal. 1988). In *Viacao*, the district court held that although deposition costs fall within the scope of § 1920(2),[3]

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[3] Section 1920(2) allows for "Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *See supra* note 2.

Alflex does not argue that the cost of the *original* deposition transcript is not within the scope of this section. Indeed, there is much support for the proposition that section 1920(2) covers the costs of *deposition* transcripts, as well as trial transcripts. In

(continued...)

id. at 438, costs for *copies* of depositions do not. *Id.* at 439. The court determined that although this circuit, before *Crawford*, held that authorization to award costs of deposition copies was implied by section 1920(2), *see Independent Iron Works*, 322 F.2d at 678, such costs could no longer be taxed because "*Crawford* . . . precluded costs other than those expressly authorized by statute." *Viacao*, 119 F.R.D. at

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[3](...continued)
Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), this court held that the language of that section "evidences an intent . . . to include within the items of cost the expenses of copies of transcripts of pretrial as well as trial proceedings." 322 F.2d at 677 n.26. In *Hudson v. Nabisco Brands*, 758 F.2d 1237 (7th Cir. 1985), the Fifth Circuit held that section 1920(2) provides the statutory basis for awarding costs for obtaining an original deposition transcript. The court held that a deposition transcript is included in the term "stenographic transcript," and that the term "court reporter" in section 1920(2) applies to stenographers other than and in addition to the official court reporters assigned to a particular courtroom. *Id.* at 1242. *See also United States v. Kolesar*, 313 F.2d 835, 837-38 (5th Cir. 1963).

439. The district court in *Viacao* also excluded costs attributed to "subpoena serving fee[s]" "because § 1920 does not allow such costs to be taxed." *Id.*

[1] We disagree with the analysis in *Viacao* and hold that fees for deposition copies and private service of process are properly taxed under section 1920. In *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767 (9th Cir. 1988), which was decided after *Crawford*, we allowed the costs of photographic materials used at the trial to be taxed even though, as the appellant argued in that case, such materials are not specifically or explicitly contained in section 1920. In *Maxwell*, we held that costs of photographic materials used at the trial "are encompassed by" the statute's allowance under section 1920(4) for "[f]ees for exemplification and copies of papers necessarily obtained for use in the

case." *Maxwell*, 862 F.2d at 770. We stated: "We recognize that *Crawford* strictly limits reimbursable costs to those enumerated in § 1920. We hold only that the common meaning of the phrase 'exemplification and copies of papers' may under certain circumstances encompass illustrative materials *if 'necessarily* obtained for use in the case,' as § 1920 requires." *Id.* (emphasis in original).

[2] The cost of deposition copies is "encompassed" by section 1920(2), and is therefore properly taxed under the *Crawford* and *Maxwell* holdings. In *Independent Iron Works*, 322 F.2d at 678, we held that the power to tax the expense of copies of depositions is "'implicit in 28 U.S.C.A. § 1920(2),'" (quoting *Perlman v. Feldmann*, 116 F. Supp. 102, 109 (D. Conn. 1953)), "qualified only by the requirement of that statute that the various copies by 'necessarily

obtained for use in the case.'" *Id.* We held that obtaining copies of depositions taken by the opposing party may be considered necessary in certain instances. *Id.* at 678-679. We now hold that our interpretation in *Independent Iron Works*, that section 1920(2) encompasses the cost of a deposition copy, is still good law, because, even after *Crawford*, we may interpret the meaning of the items enumerated as taxable costs in section 1920(2). Thus, here, taxing costs for copies of depositions was proper since Alflex does not challenge the district court's finding that the deposition copies were necessarily obtained.

Our holding is supported by recent decisions from the Fifth and the Seventh Circuits that have held that courts are free to interpret what constitutes taxable costs after *Crawford*. In *West Wind Africa Line*

v. Corpus Christi Marine S., 834 F.2d 1232 (5th Cir. 1988), the Fifth Circuit held that although section 1920 does not specifically mention depositions, courts have interpreted sections 1920(2) and 1920(4) to authorize taxing the costs of deposition originals *and* deposition copies if necessarily obtained for the case. *Id.* at 1237-38. The court stated that *Crawford* "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not, however, prevent courts from interpreting the meaning of the phrases used in § 1920." *Id.* at 1238.

In *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 852 F.2d 936 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3241 (1989), the Seventh Circuit held that the Supreme Court's decision in *Crawford* did not overrule the circuit's interpretation of section 1920(2)

as including deposition transcripts. *Id.* at 943-44. The court stated:

> Even though section 1920 does not specifically mention depositions, we do not think that *Crawford Fitting* necessarily precludes courts from finding that deposition transcripts are authorized by that statute. We agree with the Fifth Circuit that the Supreme Court did not "prevent courts from interpreting the meaning of the phrases used in § 1920."

Id. at 944 (quoting *West Wind*, 834 F.2d at 1238). Although the court did not specifically discuss whether the cost of a *copy* of a deposition transcript falls within the statute, it implicitly held that it does

when it recognized the validity of a local rule that provided:

> Except as otherwise ordered by the court, only the cost of the original of such transcript or deposition *together with the cost of one copy each* where needed by counsel . . . shall be allowed.

Id. at 944 & n.10.

[3] We also hold that private process servers' fees are properly taxed as costs. Section 1920(1) allows "[f]ees of the clerk and marshal" to be taxed as costs. Marshal's fees are governed by 28 U.S.C. § 1921 which provides, *inter alia*, for the collection of fees for serving a subpoena or summons. Local

Rule 16.4.2 permits taxing as costs fees for service of process *by any person* authorized by Fed. R. Civ. P. 4.

[4] In making Marshal's fees taxable as costs in section 1920(1), we believe Congress exhibited an intent to make service of process a taxable item. Since the enactment of section 1920(1), the method of serving civil summonses and subpoenas has changed. The U.S. Marshal no longer has that responsibility in most cases, but rather a private party must be employed as process server. *See* Fed. R. Civ. P. 4(c)[4] and 45(c).[5] Now that the Marshal is

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[4] Rule 4(c)(2)(A) provides:

> A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

Rule 4(c)(2)(B) provides:

(continued...)

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[4](...continued)

> A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose *only* –
>
> (i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,
>
> (ii) on behalf of the United States or an officer or agency of the United States, or
>
> (iii) pursuant to an order issued by the court stating that a United States marshal of deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

Fed. R. Civ. P. 4(c)(2)(B) (emphasis added)

[5] Rule 45(c) provides in pertinent part:

(continued...)

no longer involved as often in the serving of summonses and subpoenas, the cost of private process servers should be taxable under 28 U.S.C. § 1920(1).[6]

AFFIRMED.

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[5](...continued)

> A subpoena may be served by the marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age . . .

[6] We recognize that the Eighth Circuit held differently in *Crues v. KFC Corp.*, 768 F.2d 230 (8th Cir. 1985). There, the court held that the prevailing party could not recover costs for use of a special process server because "28 U.S.C. § 1920 (1982) contains no provision for such expenses." *Id.* at 234.

However, we find the reasoning in *Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637 (N.D. Ind. 1987) more persuasive. In *Roberts* the district court held that "[d]ue to the substitution of private process servers for the U.S. Marshal Service in recent years, it is appropriate to allow private process fees as costs." *Id.* at 641.